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SRS SPORTS CENTRE SDN BHD v. WORLD TRIATHLON CORPORATION

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN J
[CIVIL SUIT NO: 22NCVC-575-10-2015]
B 3 NOVEMBER 2017

CIVIL PROCEDURE: *Forum – Forum conveniens – Parties entered into event license agreement – Agreement terminated due to failure to rectify defaults – Agreement contained exclusive jurisdiction clause stipulating that litigation arising*
C *out of or relating to agreement would be tried in United States of America – Whether Malaysia proper forum to determine dispute and/or subject matter of claim – Whether Malaysian High Court seized with jurisdiction to hear case – Whether proceedings ought to be stayed – Rules of Court 2012, O. 12 r. 10(2) – Courts of Judicature Act 1964, s. 23(1)(a)*

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CONTRACT: *Agreement – Termination – Parties entered into event license agreement – Agreement terminated due to failure to rectify defaults – Agreement contained exclusive jurisdiction clause stipulating that litigation arising out of or relating to agreement would be tried in United States of America – Whether termination lawful – Whether there was fraud and/or conspiracy – Whether*
E *Malaysia proper forum to determine dispute and/or subject matter of claim*

The plaintiff, a company incorporated in Malaysia, had executed an event license agreement ('ELA') with the defendant. The subject matter of the ELA was for the plaintiff to organise triathlon events in Malaysia under the trademark 'Ironman', which was owned by the defendant. The ELA
F contained an exclusive jurisdiction clause which stated that, *inter alia*, (i) the ELA would be deemed to have been executed and delivered in the State of Florida and will be construed and interpreted according to the laws of that State and of the United States of America; and (ii) any litigation arising out of or relating to the ELA would be tried in the courts of the State of Florida.
G The defendant later terminated the ELA due to the plaintiff's failure to rectify certain defaults. The plaintiff also discovered that, on the same date the plaintiff received the termination letter, the defendant had given the license and consent to one of the plaintiff's directors to organise Ironman events in Malaysia. The plaintiff commenced an action against the defendant
H on the grounds that (i) the termination of the ELA by the defendant was unlawful; and (ii) there was a fraud and/or conspiracy involving the plaintiff's director and the defendant's representative. In the present application ('encl. 47'), the defendant sought an order, pursuant to O. 12 r. 10(2) of the Rules of Court 2012, for (i) a declaration that Malaysia was
I not the proper forum to determine the dispute and/or the subject matter of the claim; and (ii) the proceedings against the defendant be stayed on the basis that Malaysia was not the proper forum to determine the dispute and/or the subject matter of the claim.

Held (dismissing encl. 47 with costs):

(1) The plaintiff had shown a strong case to override the forum selection clause and to have the suit be tried in Malaysia. The witnesses to the triathlon events organised by the plaintiff, the financing of the events, including online payments of participants' fees, the fraud and conspiracy by one of the plaintiff's directors were all in Malaysia. The plaintiff would have to bear substantial expenses and inconvenience to bring all these witnesses to Florida, United States. The plaintiff was also a Malaysian incorporated company and had its place of business in Malaysia. Evidence, including documents related to the ELA and matters related to the triathlon event had to be given by the plaintiff's representatives who reside in Malaysia. Therefore, the evidence on issues of fact was situated or more readily available in Malaysia. (paras 13, 14, 15 & 16)

(2) For doctrine of *forum non-conveniens*, it was for the defendant to show that some other forum was more appropriate. As the plaintiff had shown a strong case why the forum selection should not be applicable and the defendant, on the other hand, had not established that Florida was a more appropriate forum, there was no reason for the case not to be tried by this court. Furthermore, as the termination was made in Kuala Lumpur, the cause of action arose in Kuala Lumpur. Therefore, the court had the jurisdiction to hear the case pursuant to s. 23(1)(a) of the Courts of Judicature Act 1964. (paras 17, 19 & 21)

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic AI-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***

Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textitle Bhd [1976] 1 LNS 31 FC ***(refd)***

Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company Ltd, Hong Kong [1995] 4 CLJ 164 CA ***(refd)***

The El Amria [1981] 2 Lloyd's Rep 119 ***(refd)***

The Elefteria [1969] 2 All ER 641 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a)
Rules of Court 2012, O. 12 r. 10(2), O. 92 r. 4

For the plaintiff - M Rajan; M/s Hakem Arabi & Assocs
For the defendant - Nimalan & Joyce Lim; M/s Skrine

Reported by Najib Tamby

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JUDGMENT

Nordin Hassan J:

Introduction

[1] Enclosure 47 is the defendant's notice of application pursuant to O. 12
B r. 10(2) and O. 92 r. 4 of the Rules of Court 2012 for an order as follows:

(i) a declaration that Malaysia is not a proper forum to determine the dispute and/or the subject matter of the claim;

(ii) the proceedings against the defendant be stayed on the basis that
C Malaysia is not the proper forum to determine the dispute and/or the subject matter of the claim.

[2] The grounds of the defendant's application as stated in the notice of application among others are the followings:

D (i) the Malaysian courts have no jurisdiction and/or Malaysia is not the proper forum for the dispute;

(ii) there are special circumstances to warrant the stay of proceedings; and

(iii) the balance of convenience or balance of justice lies in favour of stay of proceedings.

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The Background Facts

[3] The silent facts as set out in the statement of claim and affidavits filed in this case are as follows:

F (i) On 15 February 2000 the plaintiff and the defendant executed the first license agreement in which the plaintiff was given a sole and exclusive right and licence to organise triathlon events in Malaysia under the trademark known as 'Ironman'. This trademark is exclusively owned by the defendant.

G (ii) The first license agreement ended on 30 October 2004 and before the expiration of this agreement, on 20 October 2003, both parties entered into an agreement known as event license agreement whereby the first license agreement was extended from 2005 until 31 March 2009.

(iii) The event license agreement contains an exclusive jurisdiction clause,
H which is cl. 20, that states as follows:

> … This agreement will be deemed to have been executed and delivered in the States of Florida, *and will be construed and interpreted according to the laws of that State and of the United States of America … in any litigation arising out of or relating to this Agreement, the parties agree*
I *that venue shall be in the United States District Court, Middle District of Florida, Tampa Division or the Circuit Court located in Pinellas Country, Florida.* (emphasis added)

(iv) In 2005, the event license agreement was terminated by the defendant on the ground that the plaintiff had breached the said agreement by not paying the license fees within the stipulated time.

(v) Dissatisfied with the said termination, the plaintiff filed a legal suit against the defendant at United States District Court, Florida seeking a declaratory order that the termination of the agreement is invalid and unenforceable.

(vi) The suit was then settled amicably in which the defendant agreed to extend the license agreement.

(vii) Thereafter, another agreement was executed by parties on 11 December 2008 known as first addendum to event license agreement dated 20 October 2003. It is the terms of the agreement that the event license agreement dated 20 October 2003 is extended until 30 October 2014 and all the terms and conditions in the event license agreement continue to be enforceable.

(viii) Subsequently, the defendant issued a letter dated 3 September 2009, informing the plaintiff about defaults by plaintiff including default in making payment of the license fees and instructed the plaintiff to rectify the said defaults within 15 days from the date of the letter. Failing which, the defendant will terminate the agreement.

(ix) In reply, by e-mail dated 18 September 2009, the plaintiff informed the defendant that some of the complaints by the defendant had been resolved but the plaintiff requested for additional time to rectify all the defaults due to the delay of government funding and approval for the triathlon events.

(x) However, by letter dated 23 October 2009, the defendant informed the plaintiff that the said agreement is terminated due to the plaintiff's failure to rectify the defaults stated in the defendant's letter dated 18 September 2009.

(xi) In 2010, the plaintiff discovered that the defendant has given the license and consent to one of the plaintiff's directors, Chandrakumar s/o Arumugam to organise lronman events in Malaysia. This license was granted the same day the plaintiff received the termination letter.

(xii) On 22 October 2015, the plaintiff filed the writ and statement of claim against the defendant among others for a declaration that the termination of the license agreement dated 11 August 2009 by the defendant is unlawful and other consequential relief.

A **Analysis And Findings Of This Court**

[4] The defendant's application *vide* encl. 47 is premised on the exclusive jurisdiction clause, or also known as forum selection clause and the defendant contends that the United States District Court, Middle District of Florida, Tampa Division or District Court located in Pinellas Country, Florida is the B most appropriate forum to try this case.

[5] The law in regards to the issue of forum selection clause has been succinctly explained by the Federal Court in *Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textile Bhd* [1976] 1 LNS 31; [1976] 2 MLJ 154 which also has adopted the principle in the English case of *"The Elefteria"* [1969] C 2 All ER 641.

[6] Gill CJ (Malaya) (as he then was), in *Globus Shipping*, at p. 155, said this:

> As regards the general principles in relation to jurisdiction where parties D have agreed to submit exclusively to a foreign jurisdiction, the case of *The Fehmaris* Wilmer J. said at page 710:
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> > *Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be over-ridden and that proceedings in this country should be allowed to continue. However, in the end it is, and must necessarily be a matter for the discretion of the* E *court, having regard to all the circumstances of the particular case.*
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> In the same case when it went up to the Court of Appeal Lord Denning said:
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> > The next question is whether the action ought to be stayed F because of the provision in the bill of lading that all disputes are to be judged by the Russian courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: *and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a* G *stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the over-riding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.* (emphasis added)

H **[7]** In the same case, the principle of law set out in the *Elefteria (supra)* was quoted as follows:

> On the question of whether or not the court should exercise its jurisdiction in cases where the parties have agreed to refer any disputes to a foreign court, Brandon J. in *The Eleftheria* said:

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> The principles established by the authorities can, I think be summarised as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, *is not bound to grant a stay but has a discretion whether to do so or not.* (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) *The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case.* (5) In particular, but without prejudice to (4), the following matters, where they arise may properly be regarded: (a) *In what country the evidence on the issues of fact is situated, or more readily available and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.* (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With that country either party is connected and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in English; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial'. (See also *Halsbury's Laws of England*, 4th Edition, Volume 1, page 281, para 440). (emphasis added)

[8] The learned Chief Justice (Malaya) then concluded in the following words:

> *it would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied.* (emphasis added)

[9] It is clear from the authorities cited above that a forum selection clause does not oust the jurisdiction of this court and this court has the discretion to hear the case or allow the case to be tried by the tribunal agreed by parties in the forum selection clause after having considered all relevant matters.

[10] In this regard, the burden is on the plaintiff to show a strong case to override the agreement in the forum selection clause.

[11] Reverting to the present case, the material facts that can be summarised from the statement of claim, affidavit in reply filed by the plaintiff and the documents produced in this case are as follows:

(i) The plaintiff is a company incorporated in Malaysia under the Companies Act 1965 and its registered address is at No. 19-E, Wisma Tie Yoon, Lorong Medan Tunku Satu, Kuala Lumpur.

(ii) The subject matter of the event license agreements is for the plaintiff to organise triathlon events in Malaysia under the name of lronman.

(iii) The plaintiff pleaded case of fraud and/or conspiracy involved one of the plaintiff's directors, Mr Chandrakumar s/o Arumugam and the defendant's representative in relation to the termination of the said event license agreement.

(iv) On 21 October 2009, Ministry of Finance Malaysia has approved the funding of RM500,000 to organise the triathlon event on 27 February 2010.

(v) All participants in the triathlon event organised by the plaintiff have to pay certain fees and the payment is made by online banking into the plaintiff's bank account. It is also the plaintiff's pleaded case that, after the termination of the agreement, for the triathlon event on 27 February 2010, all the participants' fees were paid into Chandrakumar's bank account.

[12] Apart from this, before the termination of the said agreement, Dato Sri Ram, representative of the plaintiff, *vide* email dated 18 September 2009, had replied to the defendant's complaints and had explained the reasons for the defaults by the plaintiff.

[13] Here, I find that witnesses to the triathlon events organised by plaintiff, financing of the events including online payments of participants' fees, the fraud and conspiracy by one of the plaintiff's directors are all in Malaysia. This includes Dato Sri Ram who liaised with defendant *vide* email to explain the defaults complained of by the defendant. Certainly, the plaintiff will have to bear substantial expenses and inconvenience to bring all these witnesses to Florida, United States.

[14] The plaintiff also is a Malaysian incorporated company and has its place of business in Malaysia. Evidence including documents relating to the event license agreement and matters related to the triathlon event has to be given by the plaintiff's representatives who reside in Malaysia.

[15] Therefore, the evidence on issues of fact is situated or more readily available in Malaysia.

[16] In the circumstances, I find the plaintiff has shown a strong case to override the forum selection clause and to have the suit to be tried in Malaysia.

[17] As the termination of the agreement was *vide* a letter dated 23 October 2009 by the defendant to the plaintiff in Kuala Lumpur, the cause of action arose in Kuala Lumpur. Therefore, this court has the jurisdiction to hear the case pursuant to sub-s. 23(1)(a) of the Courts of Judicature Act 1964 which reads:

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) The cause of action arose;

[18] The other issue here is in regards to the differences of burden of proof in an application based on doctrine of *forum non conveniens* and application based on forum selection clause.

[19] As mentioned earlier, the plaintiff has to prove a strong case why the forum selection clause should not apply. However, for doctrine of *forum nonconveniens*, it is for the defendant to show that some other forum is more appropriate. This has been explained by the Federal Court in the case of *American Express Bank Ltd v. Mohamed Toufik AI-Ozeir & Anor* [1995] 1 CLJ 273; [1995] 1 MLJ 160 where Peh Swee Chin FCJ said this:

> The doctrine of *forum non conveniens* appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritimen Corp v. Cansulax Ltd (The Spiliada)* [1987] AC 460; [1986] 3 All ER 843; [1986] 3 WLR 972 after a series of decisions, as described and set out so well in that very interesting and readable joint article by RH Hickling and Wu Min Aun, *'Stay of Actions and Forum Non Conveniens'* [1994] 3 MLJ xcvii.
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> The main judgment in the *Spiliada* was delivered by Lord Goff, who adopted the *dictum* of Lord Kinnear in *Sim v. F Robinow* (1892) 19 R (Ct of Sess) 665 at p 668 being the fundamental principle in regard to this doctrine, ie that 'there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'. Lord Goff cautioned that the word '*conveniens*' in *forum non conveniens* meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.
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> *In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the court that 'some other forum is more appropriate' per Lord Templeman in The Spiliada.* Where, on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O. 11 r. 1 of the RHC is involved, then according to the reasoning of Lord Templeman, *the plaintiff (not the defendant, be it noted), would have to satisfy a Malaysian court that, by comparison, that Malaysian court is the most appropriate forum to try the action.*

A Thus, it will be seen that in the instant case, the burden lay on the bank customers, the plaintiffs, to satisfy the High Court below that Malaysia was the most appropriate forum. (emphasis added)

[20] The differences as to the burden of proof between application based on *forum non conveniens* and forum of selection has also been acknowledged B by the Court of Appeal in *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Co Ltd, Hong Kong* [1995] 4 CLJ 164; [1995] 1 MLJ 322 where the judge said this:

It is now necessary to deal with the differences that exist between applications based on the doctrine of forum non conveniens and those based on forum selection clauses.

C I begin by recognising that the law has not yet reached the stage where uniform principles are to be applied to both types of cases. And I do not regard the decision of the Federal Court in *American Express* as having created such an inroad into this area of the law where both principle and authority tell against the unification of approach. (See *Trendtex Trading* D [1980] 3 All ER 721; [1982] AC 679 (HL).)

In the former, proceedings are properly commenced in this country. The defendant then applies to stay them on the ground that there exists elsewhere a forum that is more convenient to adjudicate upon the dispute. *The burden is therefore on the defendant to demonstrate why the suit should not proceed to disposal in the place where it has been commenced.*

E In the latter, the plaintiff brings an action here in breach of an agreement to resolve the dispute in a foreign tribunal. The court is, of course, not bound to give effect to such an agreement. A forum selection agreement is to be treated upon the same footing as an agreement that confers jurisdiction. Since consent cannot create or confer jurisdiction upon a F court that has none, it also cannot oust the jurisdiction that is properly seised of litigation. (emphasis added)

[21] In the present case, as the plaintiff has shown a strong case why the forum selection clause should not be applicable and the defendant on the other hand, based on the affidavit in support, has not established that Florida G is more appropriate forum, there is no reason for this case not to be tried by this court.

[22] Before I conclude, on the same issue, the Court of Appeal in *Inter Maritime* case, agrees with the approach taken in *The El Amria* [1981] 2 Lloyd's Rep 119 which are as follows:

H That was a case where an application was made to stay an action on two grounds. *The first was based on a clause in the bill of lading which, inter alia, required all disputes to be decided in the country where the carrier (the defendant in that case) had his principal place of business.* The defendant in that case had his principal place of business in Havana, Cuba. *The second ground was that* I *England was forum non conveniens.* Sheen J rejected the argument mounted on the contractual provision and in doing so he applied the statement of the law in *The El Amria* [1981] 2 Lloyd's Rep 119. This is what he said:

> The defendants move the court for a stay on the alternative ground of *'forum non conveniens'*. The matter which have to be considered by the court when exercising its discretion whether to give effect to an agreement to refer disputes to a foreign court include those matters which are relevant to an application to stay on this alternative ground of *forum non conveniens. As the plaintiffs have discharged the burden of showing strong grounds why I should not grant a stay of this action despite the agreement that any dispute should be decided in Cuba, it follows that the defendants would be unable to discharge the burden upon them of showing that, in the absence of such an agreement,* this action ought to be stayed.
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> *In the present state of the law, I am unable to say that the approach adopted by Sheen J is wrong.* (emphasis added)

Conclusion

[23] On the foregoing grounds, the defendant's application *vide* encl. 47 is dismissed with costs of RM3,000 to be paid to the plaintiff and costs is subject to payment of allocatur fee.